Against the Grain

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Questions & Answers -- Copyright Column

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Cases of Note
from page 67

Perhaps her biggest mistake was in not realizing that Lyons didn't come after her at random. They must have had specific knowledge of her infringement. All those media conglomerates have folks out there cruising and looking for infringements. And some pay finders fees to informers.

In a particularly grody part of North Charleston is a harmless little day care center with **Disney** characters painted on the outside walls. They're safe so far because no tourist in the history of the Lowcountry has ever ventured into the wilds of North Charleston. But if I were to pick up the **Disney** informers' hot line ...

Copyright Infringement — It Has To Be At Least Sort Of Similar

Anne Hiltner v. Simon and Schuster, Inc., et al.

United States Court of Appeals for the First Circuit

34 Fed. Appx. 394; 2002 U.S. App. LEXIS 8718

This falls into the "this just in" category.

Anne Hiltner sued **Stephen King, Simon & Schuster** and **Glassbook, Inc.** for copyright infringement and invasion of privacy. She claimed **King's** novella *Riding the Bullet* was lifted from an unpublished manuscript entitled *Robert Adams,* written by her late brother with her having an ownership in the copyright as his heir.

Copyright

The Ninth Circuit found that the two works were neither "substantially similar" — neither sequence of events nor character development — nor was anything from *Robert Adams* quoted directly. See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B], at 13-8 to 13-9 (2001 (to state an actionable copyright claim, a plaintiff must show that "the defendant's work is substantially similar to [the] work [in question] such that liability may attach").

They don't address the issue of how King might have had access to an unpublished manuscript. But presumably the brother submitted it to Simon & Schuster, probably over the transom so the thing was immediately trashed.

Invasion of Privacy

There are four potential forms of invasion of privacy: (1) unreasonable intrusion into the seclusion of another; (2) appropriation of someone's name or likeness; (3) public disclosure of private facts; and (4) publicity that unreasonably places another in a false light.

The Court found that since there was no shred of similarity between the characters in the two works, **King** had not (2) appropriated her identity. Since nothing in *Riding the Bullet* deals with her private life, (3) and (4) are knocked out.

And finally as to (1) intrusion into seclusion:

"[H]er allegation that she has been under surveillance for years is completely conclusory and is not supported by specific facts."

Questions & Answers — Copyright Column

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QUESTION: Professors often ask librarians why the library does not just go ahead and digitize the entire collection. How should one respond to this?

ANSWER: I suggest loud guffaws! Faculty members appear to think the only reason that they do not have digital access to everything is laziness on the part of librarians. They are usually unaware of the major copyright concerns that would accompany such an effort. In fact, Project Gutenberg and other digital projects have had more difficulty with copyright than anything else.

A more serious answer to the faculty is that it would take a huge grant to fund the digitization project itself and an even larger on-going grant to pay the copyright royalties. Few copyright owners would be willing to permit digitization for a flat fee, and likely would charge a per use royalty. Moreover, some publishers would flatly refuse to grant permission to digitize under any conditions. Thus, library collections probably will not ever be solely in digital format, or at least in most of our lifetimes.

QUESTION: The library is trying to do a much better job in managing its electronic reserves collection by seeking permission for reproducing the work for the reserve collection after the first semester use, etc. A faculty member does not want to ask permission for using an article repeatedly and has asked if he could not simply place his personal copy of the physical journal issue on reserves.

ANSWER: Certainly, it is only when the library reproduces the work either through photocopying or electronically for reserves that the library needs to be concerned with keeping records, seeking permission after the first semester, and the like. Placing the hard copy on reserve, either from the library's own collection or the professor's personal copy of the journal issue, is fine.

QUESTION: What is the personal liability for a librarian who writes copyright guidelines for faculty when faculty members either do not understand the guidelines and infringe or simply do not comply with them?

ANSWER: It is the direct infringer and the institution that would be liable for infringing copyright in violation of the policy or guidelines, not a librarian who drafts guidelines for the institution. The librarian who drafts the guidelines is doing so at the request of a college or university official as a part of his or her job duties. Librarians are not responsible for ensuring that every faculty member and student follow the policy or the law down to the nth degree. While an unhappy copyright owner could initially name the librarian in a suit against the institution and/or the faculty member, it is likely that the suit would be dropped against the librarian who was not responsible for the infringing conduct.

QUESTION: How can the provider of full text articles in a database restrict delivery of articles from that database via interlibrary loan? Is there a difference between electronic delivery and printing and manual delivery?

ANSWER: Most databases are not only copyrighted, but they are also governed by

continued on page 69

Questions & Answers
from page 68

license agreements. The license agreement certainly may restrict the use of those articles to a particular organization or institution and may absolutely prohibit their use for interlibrary loan. So, a librarian should read the license agreement to determine whether or not articles included in the licensed database may be used to satisfy interlibrary loan requests.

There is no difference between types of delivery of articles via interlibrary loan. The issue is whether the library complies with the CONTU guidelines and abides by all license agreements for obtaining access to and use of articles from databases.

QUESTION: Some of the faculty members in a particular academic department want to post their published articles on the institution's external Website in pdf format. Will publishers readily give permission for this?

ANSWER: It depends. If the faculty author has transferred the entire copyright to the journal publisher, then naturally he must request permission to post the article in any format. If the faculty member retained the electronic rights to the article, then she can put the article on a Webpage without permission. Some copyright transfer agreements even state that the author may place the work on the Web six months or a year after it appears in the printed journal. So, there is no across-the-board answer; instead, it depends on what rights were transferred to the publisher and what the actual copyright assignment said.

QUESTION: The college has videotapes of faculty giving presentations, conducting review lectures and demonstrating different techniques. Who owns the copyright in these videotapes? What happens when the faculty member leaves the institution? May the library duplicate the videotapes for other institutions?

ANSWER: The ownership of the videotapes depends on whether the institution has a copyright ownership policy. Normally, the videotape (the physical object) would belong to the institution, but the faculty member may own the rights in her presentation that is captured on the video. The tradition in higher education in the United States is that the faculty member owns his copyrighted works. When the taping was done, if it was done correctly, the faculty member was asked to sign a release form to permit the videotaping in the first place. That form may also have assigned all rights to the institution.

In the absence of a signed agreement, what can then be done with the video depends entirely on the ownership policy. If the institution owns the copyright in faculty-produced work, it is the copyright holder and may therefore duplicate the tapes if it so desires and share copies with other institutions, etc. If the faculty member owns his copyrights, then any duplication and distribution needs to be done only with his permission. Many copyright ownership policies spell out the rights of both the faculty member and the institution when the faculty member leaves that school. In the absence of a policy, if the faculty member holds the copyright, then the videotape could continue to be used locally within the institution, but could not be duplicated without permission.